

Commissioner of Political Practices

Testimony on HB 483

March 25, 2011

Senate State Administration Committee

---

Mr. Chair, Members of the Committee:

I appear today to respectfully oppose House Bill 483. I have spoken with Rep. Howard about this bill, and appreciate that he approaches this piece of legislation with the intent of addressing the recent 9<sup>th</sup> Circuit Court of Appeals ruling, but in my capacity as Commissioner, I believe the approach to this issue is fundamentally flawed.

The court case Rep. Howard (and proponents) referred to began when a complaint was filed with the Commissioner's office in May of 2004, during the time when petitions were being circulated to qualify CI-96 for the elector's ballot. The complaint met all of the statutory requirements, and the Commissioner's office appropriately investigated the claims.

The Commissioner found three violations under current statute:

1. The pastor, after showing a simulcast during a regularly scheduled church worship, urged parishioners to sign a petition for the initiative,
2. The petition was placed in the church narthex for parishioners to sign as they passed by, and
3. The church made copies of the petition on their copier at no charge to the ballot issue committee supporting the initiative

The decision by the Commissioner was upheld by a District Court in Montana, and was heard on appeal to the 9<sup>th</sup> Circuit Court of Appeals. Anthony Johnstone, Solicitor for the State of Montana, appeared on behalf of the State.

I will simplify the ruling, and questions regarding the actual appeal and arguments therein should be directed to Mr. Johnstone, but basically the 9<sup>th</sup> Circuit decided that Montana law itself was sound and justified, but the application in this particular circumstance was unconstitutional.

Now, for those of us who are not attorneys, *de minimis* is a phrase you will hear quite a bit during this hearing, and it simply means “of minimal importance” or “trifling”. Rep. Howard’s bill attempts to implement a *de minimis* exclusion to create that minimum threshold. I completely agree that it’s the absence of a *de minimis* exclusion that needs to be addressed, either in law or through rule. I don’t believe that this is the way, however.

### The Preferred Alternative

At this point in my testimony it is necessary for me to explain to the committee that you will also today hear testimony on SB 422, which not only creates *de minimis* limits, but also was drafted with input from multiple different points of view, including Mr. Johnstone with the Department of Justice, myself and Program Supervisor Mary Baker of the Commissioner of Political Practices, non-profit entities such as The Policy Institute who study issues such as campaign finance, and Chuck Denowh, who arguably is one of the top Republican operatives in the State of Montana and who is considered an expert in the field of campaign finance and practice.

I mention SB 422 as it will accomplish what Rep. Howard states his mission is in this bill, which is to address the Canyon Ferry Ruling, but it will do so without the consequences that would be deleterious to the citizens of Montana or Montana’s electoral process.

For the record, Solicitor Johnstone also worked with Dale Schowengerdt, attorney with Alliance Defense Fund, a conservative Christian non-profit organization founded by the individuals who also founded Campus Crusade for Christ, Crown Financial Ministries, Focus on the Family, American Family Association and over 30 other conservative Christian organizations. Mr. Schowengerdt was co-counsel opposite the State of Montana before the 9<sup>th</sup> Circuit Court of Appeals. He wrote HB483, and we took his *de minimis* concept and modified it into a workable solution for the bill that the team created.

Rep. Howard resisted our suggestions in the form of a friendly amendment, so unfortunately that puts me in the sad position of opposing a very nice man’s legislation.

OK – back to HB 483.

Since the 70s, MT has required “political committees” to disclose expenditures and contributions made toward candidate elections and ballot issues, and to comply with additional reporting requirements.

“Political Committee” is defined in code as “a combination of 2 or more individuals or a person other than an individual who makes a contribution or expenditure...to support or oppose a ballot issue, or a committee organized to support or oppose a candidate”.

Admin. R. of Mont. refines this definition and differentiates 3 different kinds of political committees:

1. principal campaign committees (this is where ballot issue committees are right now, as well as candidate committees)
2. independent committees (PACs and political parties)
3. incidental committees\*\* (groups whose primary purpose is non-political, but who may become involved in a campaign)

\*\*In the Canyon Ferry circumstance, the church was perceived to have been acting as an incidental committee.

#### De minimis exclusions

On Page 5 at line 1, HB 483 creates a new statutory definition of a “ballot issue committee,” which must:

1. have as its “major purpose” the support or opposition of a ballot issue, and\*
2. accept contributions or make expenditures in excess of \$1,000 to support or oppose a ballot issue.

\*“Major purpose” is defined in the bill as the expenditure of more than 25% of the ballot issue committee’s annual budget to support or oppose a ballot issue.

Quoting from page 10 of the 9<sup>th</sup> Circuit’s ruling on the Canyon Ferry case, where the landmark *Buckley* and *McConnell* decisions were cited:

*“the Supreme Court identified three “Important” interests that justified campaign finance disclosure in the context of elections for federal office: ‘providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions’”*

Again quoting from the ruling on page 8: *“The absence of a minimum value threshold substantially affects the analysis of the disclosure requirement’s vagueness”*, and then went on to state that the copies provided by the Church were, in fact, in-kind expenditures.

For these reasons, I do support *de minimis* exclusions, but not, as HB 483 proposes, only as applied to ballot issue committees. If we’re going to implement the exclusions, then let’s do it right.

It is my desire to make Montana’s electoral process easier to access. The *de minimis* exclusion only applied to ballot issue committees would confuse participants, and would hold committees advocating the success or defeat of a candidate to a different standard.

#### Political committee definition change

At Page 8 at line 1, HB 483 specifically exempts ballot issue committees from the definition of political committees. This seemingly innocuous exemption has two major consequences:

1. Corporations or other organizations that spend less than 25% of their annual budget, **or** support or oppose a ballot issue, will be exempt from filing and reporting requirements, as will corporations and organizations that meet the 25% threshold but receive or spend \$1,000 or less on ballot issues.
  - a. As I mentioned previously in relation to the *de minimis* exclusions, I believe that the “major purpose” language of 25% or less is appropriate, but only if it applies to *all* groups, not just the ballot issue committees. Again, in SB 422, we have done exactly that.

2. But perhaps more importantly, this change would eliminate reporting requirements, *even above the de minimis thresholds*, of ballot issue committees doing work on issues unsuccessful in making the ballot
  - a. Page 11, Section 4 at line 15. Deletes the requirement for disclosure of contributions received or expenditures made prior to the time an issue becomes a “ballot issue” as defined in §13-1-101, MCA.
    - i. The hundreds of thousands of dollars raised and spent supporting or opposing efforts to get an issue on a ballot for a vote would no longer be public information. The public would lose that information that is currently, and appropriately, available.
    - ii. For example, if twelve initiatives are being circulated in Montana for various different issues, and only one garners the required number of signatures for ballot placement, the only reporting that would be required under HB 483 would be for the one successful initiative. (*refer to handout*)
      1. This is a step backward for the people of Montana, and for the decades of public policy established since the early 1970’s.
      2. Again, referencing the language in the Canyon Ferry ruling, the court stated that “...we have little trouble concluding that Montana’s informational interest is generally “important” in the context of Montana’s statewide ballot issues” and that Montana’s interest in “providing its citizenry with information about the constituencies supporting and opposing ballot issues” was “important”. If HB 483 were to become law, the citizens of Montana would lose that critical information they have a right to, and that they’ve had access to for decades. This section actually appears to contradict the Canyon Ferry ruling.

### "Small" Donors redefined

Section 5 on Page 12, lines 7-10 again removes information from Montanans by only requiring donors of over \$500 to be reported. In short, Sections 4 & 5 would only require donors of \$500 or more to a ballot issue committee if that particular ballot issue was successful in qualifying for the ballot. Again, enormous amounts of information would be lost.

### Church communication to membership

Finally, regarding the insertion of language "communication by a church that is made in the normal course of exercising its freedom of religious expression", as written the exclusion is misplaced, and the issue would be more appropriately addressed in the section of code where it also exempts communications of membership organizations and corporations to their members, stockholders, and employees. In SB 422, that is exactly where we have placed the exclusion.

HB 483's designation of church communications as a separately listed exclusion from the definition of the term "contribution," and the broad language employed in the exclusion, could conceivably result in unlimited activities by churches in candidate and ballot issue elections, with no registration or reporting requirements, as all such speech could be claimed to be an exercise of a church's freedom of religious expression.

For these reasons, I must respectfully request a No vote on this bill.

I look forward to continuing our conversation about how to best serve the people of this great state.